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DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-218335.2; B-218355.3; B-218335.4 **DATE:** October 28, 1985
MATTER OF: DLI Engineering Corporation--Reconsideration

DIGEST:

1. A contract awardee adversely affected by a prior GAO decision is not eligible to request reconsideration of that decision where the firm was notified of the original protest but chose not to exercise its right to comment on the issues raised in the protest.

2. Prior decision, which held that the agency's source selection improperly deviated from the solicitation's established evaluation scheme absent a compelling justification in the record to support the selection, is affirmed where the agency's request for reconsideration fails to establish convincingly that the prior decision contains errors of law or of fact which warrant its reversal or modification.

3. An offerors' proposed cost as adjusted for cost realism cannot be said to be unreasonable where it is virtually identical to the government's original estimate and apparently would be in line with other offerors' proposed costs if those costs were also to be adjusted for cost realism.

The Department of the Navy requests reconsideration of our decision in DLI Engineering Corp., B-218335, June 28, 1985, 85-1 CPD ¶ 742. In that decision, we sustained DLI's protest asserting that the Navy had improperly awarded a cost-plus-fixed-fee contract to Integrated Systems Analysts, Inc. (ISA) for engineering and analytical services to support the Navy's resolution of shipboard machinery vibration problems under request for proposals (RFP) No. N00140-84-R-0191. We concluded

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that the Navy's source selection deviated from the solicitation's established evaluation criteria, which placed primary importance on technical capability over cost, where ISA's proposal, although significantly lower in cost, was also markedly inferior to DLI's in terms of technical merit. Accordingly, we recommended that if DLI's proposed costs were determined to be reasonable, the Navy should consider the feasibility of terminating ISA's contract for the convenience of the government and awarding the balance of the requirement to DLI.

The Navy requests reconsideration on the grounds that our prior decision failed to apply established precedent of this Office and was based upon an erroneous factual assumption. Furthermore, the Navy indicates that DLI's proposed cost, as now adjusted for cost realism in response to our recommendation, is unreasonable. We affirm our prior decision.

Preliminary Matters

At the outset, we note that ISA, the awardee, and ROH and Ocean Environmental Systems (OES), two disappointed offerors, have joined in the Navy's request for reconsideration. We will not consider the arguments raised by those firms during our reconsideration.

Our Bid Protest Regulations, 4 C.F.R. § 21.12 (1985), provide that this Office will entertain a timely request for reconsideration of a previous decision filed by the protester, any interested party which participated in the protest, and any federal agency involved in the protest. We have held that where an interested party was on notice of the protest, but did not choose to file any comments with regard to the issues raised therein, that party is not eligible to request reconsideration. Jervis B. Webb Co., et al.--Reconsideration, B-218110.2, Feb. 11, 1985, 85-1 CPD ¶ 181. Here, the Navy confirms that ISA was properly notified of DLI's protest and was furnished a copy. Since ISA did not exercise its right to file comments on the protest during our original resolution of the matter, we will not entertain its present request for reconsideration.

The Navy informs us that it did not notify ROH and OES of the protest. Although the firms, therefore, technically may be entitled to request reconsideration, see R.A. Schemel & Associates, Inc.--Reconsideration, B-209707.2, Sept. 2, 1983, 83-2 CPD ¶ 291, we believe that the

arguments raised by the firms are untimely or otherwise properly not for consideration.

ROH challenges our recommendation that the balance of the requirement be awarded to DLI on the ground that ROH might have been the successful offeror but for the Navy's improper evaluation of proposals, and suggests that its proposal should now be reevaluated. However, it is clear that any basis for protest in this regard arose no later than ROH's April 10, 1985 debriefing. Since our regulations require that protests be filed within 10 working days after the basis of protest is known or should have been known, 4 C.F.R. § 21.2(a)(2), ROH may not raise the issue some 4 months after that debriefing took place. See Professional Review of Florida, Inc., et al., B-215303.3, et al., Apr. 5, 1985, 85-1 CPD ¶ 394.

OES also challenges our recommended corrective action and urges that we should instead recommend that the procurement be recompeted. OES contends that because more than a year has passed between the time proposals were initially submitted under the RFP and issuance of our decision, changed technical and financial circumstances dictate that the original offerors in the competitive range be given the opportunity to submit revised proposals. The firm also complains that the RFP's requirements were overly vague and that the Navy failed to apply the evaluation criteria properly with respect to its proposal, thus resulting in an improper award. Furthermore, OES asserts that our decision should be reconsidered because the firm, by not being notified of the protest, was unfairly deprived of an opportunity to be heard in the matter.

There is no indication that the Navy's requirements as set forth in the RFP have changed, and the Navy in fact has determined that acquisition of the contemplated services is urgent. Therefore, we fail to see how the passage of time in this instance has any bearing upon the propriety of our recommendation, and a recompetition at this point clearly would not be in the government's best interest. To the extent OES alleges that the RFP was defective, the basis for this allegation was apparent to OES from the face of the document itself, and, therefore, should have been protested prior to the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1); see also CBM Electronic Systems, Inc., B-215679, Jan. 2, 1985, 85-1 CPD ¶ 7.

Although the Navy did not inform OES of DLI's protest, the agency did notify the firm by letter of February 25, 1985, that an award had been made to ISA. Accordingly, if OES believed that it had grounds for protest regarding the propriety of that award, it should have raised the matter well before this time. Even though OES asserts that it only now has learned through our decision of its relative standing among the other offerors, a firm which is challenging an award must diligently pursue information which may provide additional support for its challenge. See General Electric Co., B-217149, Jan. 18, 1985, 85-1 CPD ¶ 60. Since OES, upon learning of the award, could have requested a debriefing from the Navy (the record is unclear wheth one was actually afforded the firm due to its low relative standing among the offerors), or could have initiated a Freedom of Information Act request, the necessary information concerning the evaluation of its proposal would have been available to the firm much earlier. Id. Therefore, we will not consider the matter now as part of our present reconsideration.

With respect to OES' last point, the Federal Acquisition Regulation, 48 C.F.R. § 33.104(a)(3) (as added by Federal Acquisition Circular 84-6, 50 Fed. Reg. 2268, 2271 (Jan. 15, 1985)), specifically provides that the agency shall give immediate notice of a protest filed with this Office to the contractor, if the award has been made or, if no award has been made, to all parties who appear to have a reasonable prospect of receiving an award if the protest is denied. Since DLI's protest was not filed until after the award had been made, the Navy was only required to notify ISA, the contract awardee. And, even if the protest had been filed prior to award, there was no requirement to notify OES because the firm, with the lowest technical rating and the highest offered cost, had no reasonable chance of being awarded the contract if DLI's protest were denied. Therefore, OES cannot legally complain that it was not notified of the protest. Moreover, since our prior decision did not question the Navy's overall evaluation of proposals, but rather the propriety of the agency's specific selection of ISA over DLI, we cannot conclude that OES was prejudiced by the lack of notice to the extent that we must now address the arguments raised in its reconsideration request.

Analysis

In order to prevail in a request for reconsideration, the requesting party must convincingly show either errors of law or of fact in our prior decision which warrant its

reversal or modification. Department of Labor--Reconsideration, B-214564.2, Jan. 3, 1985, 85-1 CPD ¶ 13.

The Navy contends that our prior decision failed to apply established precedent of this Office concerning the broad discretion afforded to contracting officers in selecting among competing proposals for the contract award. The Navy states that the contracting officer here fully recognized that the solicitation had placed primary importance on technical considerations over cost, but that he was well within his discretion in determining that the superior technical merit of DLI's proposal did not warrant an award to the firm at a much higher cost. The Navy notes that DLI's offered cost, unadjusted for cost realism, was 59 percent higher than ISA's offered cost as adjusted for cost realism, but DLI's technical ranking was only 26 percent higher (96 versus 76 points out of a possible 100). Therefore, the Navy urges that our decision improperly disregarded the cost/technical tradeoff made by the contracting officer in selecting the offer most advantageous to the government. We do not agree with the Navy's position.

Our prior decision did not fail to acknowledge the broad degree of discretion afforded to source selection officials in determining the manner and extent to which they can make use of the technical and cost evaluation results, see Stewart & Stevenson Services, Inc., B-213949, Sept. 10, 1984, 84-2 CPD ¶ 268, nor did it ignore the general rule that selection officials are not necessarily bound either by technical point scores or by the recommendations of technical evaluators in selecting the most advantageous offer. See RCA Service Co., B-208871, Aug. 22, 1983, 83-2 CPD ¶ 221. It simply reflected the well-settled principle that a cost/technical tradeoff for source selection purposes is ultimately governed by the tests of rationality and consistency with the solicitation's established evaluation scheme. See Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325.

The RFP provided that cost, although important, ranked fifth among five stated evaluation factors, the other factors being technical considerations: corporate past experience; personnel; management plan/approach; and contractor facilities. Under the established evaluation scheme, each of the four technical factors, by itself, was more important than cost. Our decision that the award to ISA was inconsistent with the evaluation scheme was in large part based upon the narrative comments of the Navy's

evaluators who concluded that DLI's proposal was technically far superior to the other proposals received. In this regard, the evaluators found that DLI's proposed analytical methodology for the resolution of vibration problems was so unique that it would fully satisfy the agency's requirements with a minimum degree of risk. As noted by the evaluators, the great risk associated with performance by a contractor using diagnostic techniques less sophisticated than DLI's was that erroneous machinery repair recommendations could lead to unnecessary costs far exceeding the total amount of the contract. Therefore, since ISA's proposal, although acceptable and ranked third among the six competitive range offerors, also contained numerous technical weaknesses as noted by the evaluators, it was our view that the selection of ISA had to be supported by a compelling justification. See EPSCO, Inc., B-183816, Nov. 21, 1975, 75-2 CPD ¶ 338.

We did not find such a justification in the record. The contracting officer's cost/technical tradeoff determination was that DLI's marked technical superiority would have been worth a cost premium of up to 40 percent over ISA's evaluated cost, but was not worth a cost premium of 59 percent. However, the Navy never provided any underlying rationale for that determination, such as a finding that the low cost of ISA's offer would more than offset the monetary risk of erroneous repair recommendations associated with ISA's performance of the contract.

Instead, the Navy placed an undue importance on cost. In its request for reconsideration, it states that the contracting officer "was fully prepared to pay hundreds of thousands of dollars more for the technical superiority of the DLI proposal." In our view, the impropriety of the Navy's source selection lies in the fact that the agency has never established why that superiority was worth "hundreds of thousands of dollars more" but not worth the 59 percent cost premium originally at issue here. It is also misleading for the Navy to argue that the 59 percent cost premium negates DLI's 26 percent technical superiority because, as already noted, technical considerations were paramount. Accordingly, since the technical percentage differential is of much greater weight, the two differentials should not be compared on an equivalent basis. In short, since the Navy invited competition on the basis that technical capability to meet its urgent needs was of primary importance over offered cost, we continue to believe that it was an abuse of the agency's discretion not to select DLI for the award for

the sole apparent reason that the firm's technical superiority involved a substantial cost premium.[1]/

The Navy also asserts that our prior decision is based on the erroneous assumption that ISA had proposed a diminished level of effort from that estimated in the RFP. In our decision, we stated that the cost differential between the two offers could reflect ISA's underestimation of the effort needed to perform the work rather than any excessive premium for DLI's technical superiority. The Navy points out that the RFP had provided that an estimated 44,000 man-hours by various labor categories would be required to perform the contract. Accordingly, since both ISA and DLI prepared their cost proposals in accordance with the RFP's level of effort, the Navy asserts that we erred in assuming that ISA may have proposed a lesser level of effort than that necessary to meet the Navy's requirements.

We think the Navy has misconstrued our use of the word "effort" in our decision. We fully recognized that both offerors had proposed in accordance with the 44,000 man-hours estimate in the RFP. However, as DLI correctly notes, the Navy was not acquiring a set number of man-hours, since those provided in the RFP were only estimates, but rather was acquiring particular engineering and analytical services to meet its needs. Therefore, our use of the word "effort" was meant in the broader sense, to indicate that ISA may have underestimated the nature and scope of the contract's engineering and analytical requirements.

Furthermore, in this regard, we questioned the validity of the Navy's cost/technical trade-off analysis which had hypothesized that ISA could perform on a

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[1]/The Navy states for the first time in its request for reconsideration that its technical evaluators concurred in the award to ISA. The Navy has furnished no documentation in support of this statement, and, in any event, we generally will not consider newly presented arguments by an agency where the agency failed to present such arguments in its administrative report on the original protest, and the information which forms the basis for the arguments was available at that time. See Griffin-Space Services Co.--Reconsideration, 64 Comp. Gen. 64 (1984), 84-2 CPD ¶ 528; Swan Industries--Request for Reconsideration, B-218484.2, et al., May 17, 1985, 85-1 CPD ¶ 569.

qualitatively equal basis to DLI with the use of additional contractor and government man-hours and still be lower in ultimate cost than DLI. We did not, as the Navy now asserts, believe that the contracting officer had automatically concluded that ISA would in fact be able to accomplish the same results as DLI if afforded more man-hours, or that performance of the contract by ISA would require a level of effort beyond the 44,000 man-hours estimated in the RFP. Rather, we were concerned that the cost/techical tradeoff analysis purported to establish that performance by ISA, all things considered, would still result in a lower final cost to the government.

We believed the tradeoff analysis to be flawed because it failed to recognize that only DLI had been found as offering a unique technical approach (as opposed to one that was only more efficient) that would satisfy the contract's requirements with a minimized risk of erroneous repair recommendations. Accordingly, because the trade-off analysis only addressed perceived levels of efficiency, we concluded that it did not serve to establish that acceptance of ISA's offer would prove to be most advantageous to the government.

As a final issue, the Navy indicates that we should withdraw our recommendation for corrective action because DLI's proposed cost, as now adjusted for cost realism, is unreasonable. The Navy relates that it performed a cost realism analysis with respect to DLI's proposal in response to our recommendation, and, as a result, has calculated that DLI's best and final offer should be upwardly adjusted from $1,467,175 to $1,662,055 due to DLI's apparent understatement of certain cost elements, versus ISA's evaluated cost of $923,175. The Navy asserts that the technical superiority of DLI's proposal does not warrant such a cost premium.

We have reviewed the Navy's cost realism determination, and we cannot conclude that it is erroneous. See Dynamic Science, Inc., B-214111, Oct. 12, 1984, 84-2 CPD ¶ 402. However, although we are concerned that performance by DLI may now entail a greater cost expenditure than that which was in issue during our original resolution of the matter, we do not believe that the Navy has established that DLI's evaluated cost[2/] is now unreasonable per se.

[2/]We note that the 80 percent differential between DLI's and ISA's evaluated costs is largely based on the Navy's adjustment of DLI's overhead rate from 125 to 140 percent for cost realism purposes. However, DLI has offered to cap its overhead rate at 130 percent, which should mean a $56,069 reduction in its evaluated cost so as to decrease the present 80 percent differential.

The issue of cost unreasonableness generally relates to a finding that a firm's proposed cost is so high (in relation to the government's estimate or to the proposed costs of the other offerors) that the firm almost certainly has no chance of being awarded the contract. See, e.g., Informatics General Corp., B-210709, June 30, 1983, 83-2 CPD ¶ 47.

In this matter, the Navy has informed us that the government's original estimate for the work, based upon the costs incurred by OES in performing similar services, was $1.6 million. Clearly, since DLI's proposed cost as now adjusted for cost realism is virtually identical to the government's estimate, it cannot be said to be unreasonable in that respect. Moreover, the cost realism analyses performed for ISA and DLI caused upwards adjustments of 18 and 13 percent, respectively, in their proposed costs, and we are therefore of the impression that the proposed costs of the remaining competitive range offerors would be adjusted to a similar degree if the Navy performed additional analyses. Since DLI's unadjusted cost was in line with the proposed costs of those other offerors, and in fact was not the highest, the result of the cost realism analysis has not demonstrated that DLI's evaluated cost is now unreasonable in relation to the other offers received, or the kind of effort proposed.

Accordingly, since the Navy has not shown that our prior decision contains errors of law or of fact, that decision, with its recommendation that corrective action be taken, is affirmed.

for Milton J. Socolar
Comptroller General
of the United States